No. 85-1277

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1986

SCHOOL BOARD OF NASSAU COUNTY, FLORIDA,
et al.
Petitioners

v.

GENE H. ARLINE
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF SENATORS CRANSTON, ET AL. AND OF REPRESENTATIVES ATKINS, ET AL., AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the contagious, infectious disease of tuberculosis constitutes a "handicap" within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

2. Whether one who is afflicted with the contagious infectious disease of tuberculosis is precluded from being "otherwise qualified" for the job of elementary-school teacher, within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

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INTEREST OF AMICI CURIAE[1]

This amicus brief is submitted on behalf of Senators Alan Cranston, Daniel Inouye, Edward Kennedy, Paul Simon, Robert Stafford, Lowell Weicker, and Representatives Chester Atkins, Les AuCoin, Howard Berman, Mario Biaggi, Barbara Boxer, Sala Burton, John Conyers, Ronald Dellums, Mervyn Dymally, Don Edwards, Vic Fazio, Barney Frank, Bill Green, Augustus Hawkins, Charles Hayes, James Jeffords, Mel Levine, Mike Lowry, Matthew Martinez, Robert Matsui, Stewart McKinney, George Miller, Bruce Morrison, James Scheuer, Patricia Schroeder, Louis Stokes, Gerry Studds, Edolphus Towns, Henry Waxman and Ted Weiss. Some of the amici

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[1]. Letters from the parties as consenting to the filing of this brief are being filed with the Clerk.

were Members of Congress when Section 504 was originally enacted. Senators Cranston, Kennedy and Stafford served in 1972 on the Subcommittee on the Handicapped of the Labor and Public Welfare Committee, which actually drafted Section 504 in that year.

Many of the amici serve on the committees of the Senate and the House which have jurisdiction over either Section 504 of the public health laws. For example, Senator Weicker is Chairman of the Senate Subcommittee on the Handicapped, which has jurisdiction over the Rehabilitation Act. Representative Hawkins is Chairman of the House Education and Labor Committee, which has jurisdiction over Section 504, and Representative Jeffords is the ranking Republican member of that committee, as well as the author of the 1978 Amendments to

Section 504. Representative Waxman is Chairman of the House Subcommittee on Health and the Environment, which has jurisdiction over all public health and health regulatory and financing issues. As Members of Congress who are responsible for legislating civil rights and public health issues, Amici offer this brief to assist the Court in reaching its decision.

SUMMARY OF ARGUMENT

The Court has accepted certiorari on two questions. With regard to the first, amici argue that the plain language of the statute, its legislative and regulatory history, and its construction by this and other courts demonstrate that Section 504 unambiguously prohibits discrimination against individuals who have or are perceived to have contagious diseases.

With regard to the second question, amici argue that this question must be answered on the basis of the factual issues that each case presents. Amici believe that the Court of Appeals was correct in citing the numerous factual issues that require resolution at the trial court level and in issuing a remand order. Section 504's statutory and regulatory scheme was developed to resolve questions such as those raised by this case. Thus, on remand, the question of whether Respondent was "qualified" to continue her employment with the Nassau County school system can be answered within the context of Section 504. That context acknowledges safety and health concerns and reinforces the policies of the public health laws.

I. DISEASES WHICH ARE CLASSIFIED AS CONTAGIOUS OR DECISIONS MADE ON THE BASIS OF CONTAGION ARE NOT EXEMPT FROM SECTION 504 COVERAGE

A. Introduction

Two different arguments are presented by the petitioner and the Department of Justice (hereafter referred to as DOJ) both of which would shield any adverse action against a person with a communicable disease from scrutiny under Section 504. The first argument is that contagious diseases are simply exempt from statutory coverage. Petitioner's Brief (hereafter Pet. Br.) pp. 14ff.; DOJ Br. pp.7ff. The second is that adverse decisions against handicapped persons which are based on contagion, whether accurate or inaccurate, are not decisions based on handicap and therefore are not subject to Section 504. Id. This

section will demonstrate that both of these arguments are wholly inconsistent with the letter and intent of Section 504. Application of Section 504 to communicable diseases is necessary to effectuate Congressional intent. Amici do not seek, and would oppose, any interpretation of Section 504 that would require exposing school children, or any other individuals, to an appreciable risk of contracting a serious disease.

1. Clarification of the Underlying Issues

Before addressing these arguments directly, it is critical to clarify some underlying issues. First, petitioner and DOJ repeatedly and incorrectly equate coverage under Section 504 with remedy. As in other civil rights laws, a finding that a

plaintiff is a member of the protected class does not establish illegal discrimination, nor does it guarantee a remedy. Rather, coverage under the statute simply requires the court to scrutinize a recipient's actions to assure that an otherwise qualified handicapped person was not denied participation in a covered program on the basis of handicap.

The petitioner also equates communicable diseases with the present ability to transmit the disease to third parties. As explained by the amicus briefs of the American Medical Association (AMA) and the American Public Health Association (APHA), this may be erroneous in a given case. These equations of coverage and remedy and communicable disease with present ability to transmit result in a misleading

characterization of the issue before the Court. See e.g. Pet. Br. p. 19.

Finally, it is also important to point out that the threshold question of whether a plaintiff is a "handicapped person" extends beyond the area of employment. This initial finding is necessary to challenge any denial of participation in or the benefits of any of recipients' programs or activities, such as, education, welfare or health services, recreation, and housing. Hence, an exemption of contagious diseases would have far-reaching results in areas other than employment. Not only could a person with tuberculosis who had been successfully treated and was no longer contagious be precluded from any employment opportunity, but a similarly situated child could be precluded from attending school, and a

patient with a history of tuberculosis could be denied admission to a federally funded hospital or nursing home.

2. The Justice Department's Separation of Contagion From the Underlying Disease Is Both Illogical and Contrary To Congressional Intent

The Department of Justice presents a far-reaching attack on Section 504 coverage by arguing that even if contagious diseases are covered and even if a person with a contagious disease is handicapped within the meaning of the statute,[2] if the recipient based its action on the belief that the person was contagious -- whether correct or

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[2]. The Department of Justice is willing to concede that Ms. Arline is so "handicapped," DOJ Brief p. 12, but argues that the "extent of any physical disability actually suffered by Arline is wholly irrelevant to the Section 504 inquiry in this case." Id.

erroneous -- there is no Section 504 coverage because actions on the basis of contagion are not actions on the basis of handicap. DOJ attempts to separate the ability to communicate a disease from the disease for purposes of Section 504 analysis and the entirety of its argument rests on this separability premise. In fact, the two cannot be separated. One cannot simply be contagious. One must be contagious in the sense of being capable of infecting others with a specific disease. Thus, the School Board fired Arline because it was concerned that she might communicate tuberculosis. Without the underlying handicap there would be no fear of contagion.

The Department of Justice states that a decision based on contagion against a handicapped person with a communicable

disease is like a decision based on height against a deaf or blind person. (DOJ Brief, pp. 10-11). The error in this analogy is obvious. Contagion, at some times and in some circumstances, is the primary characteristic of "communicable diseases" (AMA Brief p. 2, n. 2), whereas height is totally unrelated to blindness or deafness. A decision made on the basis of contagion against a person with a communicable disease is more analogous to a decision made on the basis of height against a midget. In both cases the utilized criterion is an inherent characteristic of the handicap, and the question whether the use of the criterion constitutes illegal discrimination turns on the qualifications for the program in question.

In the case of communicable diseases, the ability to infect others may be a legitimate disqualifying criterion in certain circumstances but may be erroneously applied in others. A person with such a disease may not be contagious or if contagious will not transmit the disease. The correct application of this criterion will depend upon provable facts. For example, if a disease can be transmitted only by biting, a two-year-old might be excluded from a program but an adult would not.

The Department of Justice and Petitioner attempt to isolate a particular characteristic of a handicap, and ask this Court to declare that discrimination based on that characteristic is beyond the scope of Section 504. This argument has far reaching consequences, not only in Section

504 cases but in other areas of civil rights as well. It would require this Court to depart from existing precedents and would undermine all disparate impact analyses. For example, in the context of race discrimination, a requirement that stewardesses not have broad noses or large lips has been held to be discriminatory against blacks. EEOC Dec. No. 70-90, 1 F.E.P. 236 (1960). Further, a height requirement is not only relevant as applied to midgets who, by definition, all share the characteristic, but also as applied to women, Asians, Latins and Mexican Americans. Dothard v. Rawlinson, 433 U.S. 321 (1977); Craig v. City of Los Angeles, 626 F.2d 659 (9th Cir. 1980), cert. denied, 450 U.S. 919; U.S. v. City of Buffalo, 457 F. Supp. 612 (W.D.N.Y. 1978); Officers for Justice v.

CSC, 395 F. Supp. 378 (N.D. Cal. 1978). While showing a disparate impact is not necessary in this case because contagion (at some point) is a primary characteristic of tuberculosis and other communicable diseases, the judicial recognition that members of protected classes can challenge the use of a physical characteristic which is common to the class, defeats Petitioner's and DOJ's attempt to separate and shield decisions made on the basis of a characteristic of a handicapping condition - - contagion.[3]

3. Section 504 Prohibits Handicap Discrimination Based Upon Irrational But Honestly Held Beliefs

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[3]. Section 504 incorporates "effect" discrimination. Alexander v. Choate, 469 U.S. 287 (1985); 45 CFR Part 84, Appendix A (May 4, 1977).

Petitioner and the Department of Justice argue that a handicapped person is protected only if the recipient based the adverse action on an actual or perceived physical or mental limitation in functioning. Hence, according to their reasoning, a handicapped person who was perfectly qualified for a job would be stripped of all Section 504 protection as long as the employer asserted a reason other than the physical or mental inability of the person to participate in a given program -- contagion, aversion, fear of increased medical or insurance expenses, superstition, or any other inaccurate but honestly held belief. If this reasoning were allowed to prevail, Section 504 would be destroyed.

Congress was well aware that the greatest barrier faced by disabled people was the

uninformed, stereotyped and prejudicial attitudes held by others. The belief that handicaps are contagious has been among the stereotypes faced by disabled people. For example, both epilepsy and cancer have been thought to be contagious by the general public.[4] The belief that someone with a communicable disease is actively contagious beyond the period of actual contagion, is no less a stereotype and adverse action may be no more justified. Congress chose to prohibit all actions based on irrational, prejudicial or simply inaccurate reasons

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[4]. See, O. Temkin, The Falling Sickness: A History of Epilepsy from the Greeks to the Beginnings of Modern Neurology, 114-17, 226-27 (2d ed. 1971); Note, "Legal Recourse for the Cancer Patient-Returnee: The Rehabilitation Act of 1973," 10 Am. J. of Law and Medicine 309 (1984).

that excluded and segregated handicapped people.

B. The Plain Language of the Statute and the Legislative History Reveal Congress' Intent That Section 504 Be Interpreted Broadly and That It Applies to Contagious Diseases [5]

1. The Plain Language of the Statute Demonstrates That Section 504 Covers Communicable Diseases

There is no basis whatsoever for carving out an exemption from 504 coverage for communicable diseases.[6] There is nothing in the language of the statute and regulations

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[5]. Amici are pleased to inform the Court that Respondent has adopted their analysis of the legislative history of Section 504.

[6]. The record in this case presents an easy case for determining whether tuberculosis is a "handicap" within the meaning of Section 504. Ms. Arline's respiratory functions were seriously affected and she required hospitalization due to the illness. J.A. 11. Moreover, she was fired on the basis of contagion.

to indicate an exception for impairments which are classified as communicable.

As stated by this Court in North Haven Board of Education v. Bell, 456 U.S. 512, 520 (1982), "[o]ur starting point in determining the scope of [Section 504] is, of course, the statutory language." Section 504 defines handicapped person to include:

> any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. 29 U.S.C. 706(7)(B)

According to the reasoning of North Haven, which construed Title IX of the Education Amendments of 1972, "There is no doubt that 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language . . . Because §901(a) neither expressly nor

impliedly excludes employees from its reach, we should interpret the provision as covering and protecting these `persons' unless other considerations counsel to the contrary." North Haven, 457 U.S. at 521. The same reasoning applies to Section 504, and it contradicts the suggestion of Petitioner that the absence of the words "tuberculosis" or "contagious diseases" in the statutory definition implies an intent to exclude persons with such diseases from the coverage of the Act. Pet. Br. p. 24. If Congress had chosen to exclude communicable diseases, it could have done so in the same manner that it addressed questions about drug and alcohol abusers. See, infra, at pp. 29ff.

As demonstrated below, Congress and the Department of Health, Education and Welfare

specifically chose not to provide an exclusive list of handicapping conditions in order to provide broad statutory coverage. Congress was well aware that a wide variety of conditions fell within the broad regulatory definitions (e.g., cancer, drug addiction, alcoholism) and indicated its approval.[7]

Moreover, the plain language of the statute also refutes Petitioner's position that discrimination must be based on an actual or perceived functional limitation in order to fall within Section 504. Pet. Br.

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7. Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 632 (1984) (Congress itself endorsed the regulations in their final form); Alexander v. Choate, 469 U.S. at 293 n. 13 (1978 Amendments to the Act were intended to codify the regulations enforcing Section 504); See infra, discussion of Section 504 regulations and Congress' role in reviewing and approving them.

15-16. Clearly, by including those persons with a history of a handicap Congress intended to cover persons with "no actual incapacity at all," Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979). According to Petitioner and DOJ, a person with a history of polio may be excluded from a recipient's program so long as the employer holds the good faith but ignorant belief that the person is currently contagious. This intepretation of Section 504 defies the plain language of the statute.

2. Legislative History Demonstrates That Congress Intended Section 504 To Be Interpreted Broadly

According to North Haven, 456 U.S. at 521, this Court should next look to the legislative history of the Act "for evidence as to whether Congress meant somehow to

limit the expansive language of [Section 504]." A review of the legislative history of Section 504 reveals an intent to define handicap broadly to include even those handicaps which sometimes pose safety risks and to bar discrimination against qualified handicapped persons regardless of the motive for the exclusion.[8]

The early legislative history of Section 504 dispels the notion presented by DOJ that only adverse action which is based on actual or perceived inability or limitation is subject to scrutiny under Section 504. For

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[8]. Contrary to the Department of Justice argument, Congress never based its prohibition against discrimination on discriminatory intent. As this Court noted, "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by discriminatory intent." Alexander v. Choate, 469 U.S. at 476.

example, DOJ asserts that "discrimination motivated by an aversion to a cosmetic disfigurement would not, absent a perceived or actual nexus to a disabling condition, constitute handicap discrimination under Section 504." DOJ Brief p. 15. The core of DOJ's argument is that the condition constituting the reason for exclusion (i.e., contagion) must itself constitute a "handicap" in order for Section 504 to become operative. ("Contagion" is not a "handicap" DOJ Br. pp. 5, 6, 12, and passim). So, since "aversion" is not a handicap, a recipient may discriminate against a person whose facial disfigurement does not impair their mental or physical abilities. And therefore, since "increased insurance costs" is not a handicap, an exclusionary practice, based on this reason

would also not be covered by the statute. This reasoning does violence to the letter and spirit of Section 504.

In introducing the predecesor bill to Section 504,[9] Congressman Vanik recounted the various ways that handicapped persons are subjected to discrimination. Stereotyped views about ability were recognized as a major barrier. However, Congressman Vanik also cited unfounded fears about safety as resulting in discrimination.

> In the past, the reason for excluding these children from their right to an

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[9].See Alexander v. Choate, 469 U.S. at 304 n. 13 (1985). "Given the lack of debate devoted to Section 504 in either the House or Senate when the Rehabilitation Act was passed in 1973, ... the intent with which Congressman Vanik and Senatory Humphrey crafted the predecessor to Section 504 is a primary signpost on the road toward interpreting the legislative history of Section 504." Id.

> education has never been very clear. At times handicapped children were seen as a physical threat or as uneducable.
>
> * * *
>
> We have employers who fear to hire the handicapped believing that the handicapped are more likely to have accidents, thus raising workers' compensation rates, and insurance costs.[10]

Vanik, 117 Cong. Rec. 45974 (Dec. 9, 1971).

A case cited by Congressman Vanik illustrates that aversion alone, independent

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[10]. Numerous studies have refuted the basis for fear of increased accidents or insurance costs. Report commissioned by Congress under Section 130 of the Rehabilitation Act of 1973, P.L. 93-112, and reported back to Congress prior to the 1978 Amendments to Section 504, Urban Institute, Report of the Comprehensive Service Needs Study, citing, at 318, Bureau of Labor Statistics, U.S. Department of Labor, Bull. No. 123, The Performance of Physically Impaired Workers in Manufacturing Industries (1948); U.S. Bureau of Labor Standards, U.S. Department of Labor, Bull. No. 234, Workers Compensation and the Physically Handicapped Worker 10 (1961).

of an actual or perceived inability to function in a recipients' program constitutes illegal discrimination. "In one case a court ruled that a cerebral palsied child, who was not a physical threat and was academically competitive, should be excluded from public school because his teacher claimed his physical appearance `produced a nauseating effect'on his classmates." Id. [11]

Senator Humphrey cited similar examples when he introduced his corollary bill in the Senate. "But too often we keep children, whom we regard as `different' or a

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[11]. DOJ states on p. 15 that this example is distinguishable from the case of aversion to a cosmetic disfigurement which does not constitute an actual or perceived limitation. The cases are indistinguishable on the relevant point -- in both cases the adverse action is based on aversion and not on actual or perceived inability which DOJ throughout its brief states as a prerequisite to Section 504 coverage.

`disturbing influence' out of our schools and community activities altogether, rather than help them develop their abilities in special classes and programs." 118 Cong. Rec. 423 (1972)

Senator Mondale similarly described a woman "crippled by arthritis" who was denied a job because the "college trustees didn't like the idea of her working as a clerk at the college because `normal students shouldn't see her.'" 118 Cong. Rec. 36761 (Oct. 17, 1972).[12]

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[12]. Again to emphasize, this legislative history is relevant because DOJ's whole theory depends on the premise that only actions taken on actual or perceived inability to function are covered by the statute. This is the basis for DOJ's argument that even an admittedly handicapped person is not protected if the employer's reason was contagion rather than inability to function. (DOJ Br. pp. 15, 21).

When Section 504 was first passed in 1973, the definition of handicap was narrowly limited to individuals who had a physical or mental disability which constituted or resulted in a substantial handicap to employment and could reasonably be expected to benefit in terms of employability from vocational rehabilitation services under the Act.[13] In 1974 Congress broadened the definition in relationship to the non-discrimination provisions of the Act. The 1974 legislative history leaves no doubt that Congress intended to define broadly those included under the protection of the Act.

Introducing the new definition, Senator

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[13]. P.L. 93-112; See S. Rep. No. 93-1297, 93rd Cong., 2d Sess. 37-38 (1974).

Cranston[14] stated: "The new definition in section 7(6) of the act is meant to include a broader group of handicapped persons who suffer from discrimination practices in employment, and participation in certain services and programs even though their handicap may not affect job performance or may even no longer exist."
120 Cong. Rec. 30531 (Sept. 10, 1974) (emphasis added). "Section 504 was enacted to prevent discrimination against all handicapped individuals, regardless of their need for, or ability to benefit from, vocational rehabilitation services, in relation to Federal assistance in employment, housing, transportation,

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[14]. Senator Cranston chaired the Subcommittee on the Handicapped for purposes of consideration of the 1973 Rehabilitation Act and acted as floor manager.

education, health services, or any other Federally-aided programs." Id. at 30534.

Senator Cranston made it clear that persons who experienced discrimination on the basis of prior medical history alone (whether or not there was an actual or perceived functional limitation), were handicapped within the meaning of the new definition. In fact, the motivation of the recipient was not the determining factor, but instead whether the classification (real or perceived) resulted in exclusion.

> The amended definitions of section 7(6) is also intended to make clearer that the coverage of sections 503 and 504 extends to persons who have recovered -- in whole or in part -- from a handicapping condition, such as a mental or neurological illness, but who may nevertheless be discriminated against on the basis of prior medical

> history and to persons who were inappropriately classified as handicapped (for example, mentally ill or mentally retarded) and where such inappropriate or incorrect classification has resulted in that person's inability to participate in all the activities covered by section 503 and 504.

Id. (emphasis added)

The new definition also made clear that Congress meant to address any adverse action based on handicap whether or not the person was in fact handicapped. S. Rep. No. 1297, 93rd Cong.,2nd Sess. 6389-91 (1974).

> Further, the amended definition clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, just as Title VI of the Civil Rights Act of 1964 prohibits discrimination on the ground of race, whether or not the person discriminated against is in fact a member of a racial minority. Id.

Hence, neither the 1974 or the 1978 legislative history contains a drop of "evidence that Congress meant somehow to limit the expansive language of Section [504]." North Haven, 456 U.S. at 521. In fact, this legislative history makes it clear that Congress did not intend to exempt handicapped persons from coverage because of safety concerns. Rather, Congress was assured that the Section 504 "qualified" requirement was sufficient to address safety concerns.[18]

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[18]. As this Court has acknowledged, Congress was extensively involved in the formulation of the H.E.W. Section 504 regulations, which govern in this case. As stated in Consolidated Rail Corp., 465 U.S. at 632, "the responsible congressional committees participated in the formulation, and both these committees and Congress itself endorsed the regulations in their final form." See also, Alexander v. Choate, 469 U.S. 287.

The legislative history reveals that particular attention was given to the definition of handicapped person and its interpretation by the Department of Health, Education, and Welfare (HEW). During Congress' review of the regulations promulgated to enforce Sections 501, 503 and 504, a question was raised regarding the HEW and Justice Department interpretations of handicapped person to include alcoholic and drug abusers.[16] The issue arose because of an interpretation by airlines holding federal contracts that the affirmative action obligations of Section 503 required them to hire unqualified alcoholics and drug addicts as pilots. In response to these

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16. The agencies' interpretation was based on an opinion by the Attorney General in 1977. 43 A.G. Op. 12 (April 12, 1977).

safety concerns, the House passed a bill exempting drug addicts and alcoholics from the definition of "handicapped person."[17] The Senate bill which was later adopted rejected this broad exemption in favor of a narrow exemption which simply clarified that employers are not required to hire handicapped individuals who were not qualified.[18]

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17. H.R. 12467 (1978).

18. 29 U.S.C. §706(7)(B) provides:

> For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a

The legislative history of this provision makes it clear that the Senate understood that the amendment was technically unnecessary but agreed to it in order to facilitate agreement with the House at conference.[19] Hence, since the amendment merely reinforced Congress' understanding of Section 504, it provides guidance for interpretation of the statute in cases raising issues of safety.

As stated by Senator Williams,[20]

> It is unfortunate that any group of handicapped persons

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direct threat to property or the safety of others.

19. Senator Randolph, the majority manager of the bill stated, "It [the amendment] will be helpful to us as we go to conference with the House." 124 Cong. Rec. 30322 (Sept. 20, 1978).

20. Senator Williams was Chairman of the full committee of Labor and Public Welfare and was a primary author and sponsor of the 1973 Rehabilitation Act.

> should be singled out for special treatment under the nondiscrimination provisions of the act. However, because of misunderstandings and distortions concerning employment rights of alcoholics and drug dependent persons, Members of the Senate have been under pressure to adopt language that would exclude alcoholics and drug dependent persons from all protection under sections 503 and 504 of the Rehabilitation Act. Indeed, the House-passed bill, H.R. 12467, includes such language.
>
> The amendment offered by Senator Cannon is a compromise that would protect such persons from discrimination but would reassure employers that it is not the intent of Congress to require any employer to hire a person who is unqualified for the position or who cannot perform competently in his or her job. 124 Cong. Rec. 30322 (Sept. 20, 1978).

* * *

> Section 504 of the act requires that otherwise qualified handicapped individuals shall not . . . be subjected to discrimination under any program or activity receiving Federal financial assistance.
>
> The significant word here is "qualified." Sections 503 and 504 both state explicitly that covered employers need hire only "qualified" handicapped individuals. Id.

* * *

Senator Hathaway also explained that the amendment was technically unnecessary.

> While I do not believe that a clarifying amendment really is necessary, I support the pending amendment as a vast improvement over the corresponding language in the House-passed bill.
>
> The purpose of the pending amendment is to meet

> the concerns of employers . . . that persons whose alcoholism or drug abuse impairs their capacity to perform particular jobs or participate in particular activities need not be employed in those jobs or be permitted to participate in those activities.
>
> Regulations implementing section 503 and 504 already address these concerns. They make clear that the protections of sections 503 and 504 only apply to otherwise qualified individuals. 124 Cong. Rec. 30324 (Sept. 20, 1978). (emphasis added)

Senator Williams concluded the debate by reiterating that the need for the amendment arose from "misunderstandings" about the operation of Section 504, that it "simply makes explicit what prior interpretations of the act have found" and that the principal is "implicit in the act's limitation" to

qualified handicapped persons. 124 Cong. Rec. 37509 (Oct. 14, 1978).[21]

Hence, even when presented with a dramatic safety concern, the qualifications of airline pilots, Congress chose to simply reiterate the principle underlying the Act--that a handicapped person must be "qualified" to participate in the recipient's program in order to prevail in a Section 504 case, but that safety issues must be analyzed in the Section 504 context of examining the facts presented in a given case. Petitioner is in essence asking this

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[21]. HEW enforced the statutory clarification through letters and policy statements, since no regulatory change was required. See, e.g., HEW Memorandum from Assistant Secretary for Health to the Secretary, "Nondiscrimination on the Basis of Handicap: Alcoholism or Drug Abuse," June 28, 1978, cited in Silverstein and Kamil, Handbook for the Implementation of Section 504, 153-4 (2d Ed., April 1981).

Court to adopt the House approach of creating a broad exemption of a class of handicapped people, which was explicitly rejected by Congress when it was specifically presented with this option.

The 1978 legislative history further evidences Congress' intent to define "handicapped person" broadly to cover diseases and to bar discrimination on any basis against qualified handicapped persons. As Senator Hathaway stated:

"In defining "handicapped individuals" for the purposes of sections 503 and 504, the law does not list specific impairments or disabilities to be covered." 124 Cong. Rec. 30325 (Sept. 20, 1978).

H.E.W. further explained the definition

in the 1977 regulations that were reviewed and approved by Congress in 1978 [22]:

> The definition does not set forth a list of specific diseases or conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list . . . .

45 C.F.R. Part 84, Appendix A at 375.

In a letter to Secretary Califano, acknowledging H.E.W.'s interpretation of the regulations to include persons with cancer, Senator Humphrey stated:

> Early diagnosis and improved methods of treatment have lowered the recurrence rate of major forms of cancer. At the same time, a growing number of former cancer patients are seriously and unjustly impaired in their ability to fulfill personal,

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22. Consolidated Rail Corp., 465 U.S. at 624; Alexander, 469 U.S. at 309.

> family and community responsibilities by their inability to secure employment upon recovery. This situation is too frequently the result of irrational fears or prejudice on the part of employers or fellow workers.
>
> I know you agree with me that persons who have suffered a serious illness should not have their misfortune compounded by an arbitrary denial of the right to employment upon recovery, or when they are able to work.

123 Cong. Rec. 13515, 16 (May 4, 1977). Petitioner's and DOJ's argument would ignore the scope of the problem presented by Senator Humphrey and acknowledged by Secretary Califano that irrational fears (including a belief that cancer is

contagious) and other prejudices act as "unjust barriers." Id.[23]

Hence, the legislative history makes clear that the fact that contagious diseases may pose safety risks, in certain circumstances at certain times, does not justify a broad exemption from coverage under Section 504. The legislative history further refutes DOJ's position that the motivation of the employer and its reason for taking an adverse action are controlling for purposes of coverage. Contagion is a characteristic of a communicable disease and

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[23]. A person with a history of cancer or current cancer which is in remission may have no actual or perceived functional limitation. In this sense, the person with cancer is analogous to the person with the cosmetic disfigurement which Justice would exclude from coverage unless "the disfigurement is regarded, rightly or wrongly, as implying an impairment in the strict sense." DOJ Br., p. 15.

such characteristics of handicapping conditions cannot function as bars to participation unless they in fact render the person unqualified. As demonstrated in the briefs filed by the American medical Association and the American Public Health Association, in the vast majority of cases a person with the "contagious disease" of tuberculosis will be non-infectious and pose no risk to others. A recipients' adverse action based on contagion in such circumstances is no different from the variety of situations which Congress addressed in passing and amending Section 504.

3. Section 504 Does Not Interfere With the Enforcement of the Public Health Laws But, Rather, Aids in Their Enforcement

Petitioner and amici also argue that coverage of contagious diseases would interfere with public health law enforcement, and therefore this Court should assume that Congress intended to exempt contagious diseases from coverage under Section 504. First, imputing an exemption by silence is contrary to the approach developed by this Court as set forth above. In fact the same Senate committee which authored Section 504, the Committee on Labor and Public Welfare, had jurisdiction over all public health programs. The chairman of that Committee, Senator Williams, was a primary sponsor of Section 504. Interestingly, immediately following the debate on the inclusion of drug addicts and alcoholics in the definition of "handicap" under the Act, the committee proceeded to

consider amending the Public Health Act to extend, inter alia, to disease control programs.[24]

Second, public health law concerns many areas of health besides contagious diseases (e.g., drug and alcohol programs, maternal and child health program, mental health, mental retardation, genetic disease screening, nutrition, and health planning). Petitioner's position would therefore eliminate all coverage where an overlap exists.

Third, the enforcement of Section 504 reinforces public health policies. As the amicus brief for the American Public Health Association demonstrates, the public health laws depend upon individuals and their

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[24]. 124 Cong. Rec. 30324 (Sept. 20, 1978).

doctors reporting communicable diseases. If such individuals must fear the loss of jobs and federally funded benefits as a result of such testing and reporting, they will cease to provide the critical data necessary to effectuate public health measures.

Finally, public health concerns can be easily reconciled with Section 504. As demonstrated below, Courts have adequately addressed safety concerns in a variety of situations and could easily incorporate public health concerns relating to contagion in the "qualified" analysis of Section 504. See American Public Health Association amicus brief.

The purpose of Section 504 in this context is to assure that public health standards are in fact the basis of recipient's decisions, rather than

irrational and uninformed judgments which serve only to undermine public health goals. This exact concern was addressed by Congress in relation to the extensive involvement of public health officials in the area of alcohol and drug abuse.

Responding to the House amendment which would have excluded all alcoholics and drug addicts "in need of rehabilitation" from the statute, Senator Williams stated:

> Public health authorities recognize that the most effective approach to treating drug addiction or alcoholism is to maintain some form of treatment or counseling long after the client has ceased to abuse drugs or alcohol and is perfectly capable of safe, effective job performance.
>
> * * *
>
> To add to the stigma by excluding such persons from protection under this law

> would only serve to encourage them to deny they have a problem rather than to admit it and to seek treatment. This would be a dangerous step backward in the Nation's efforts to bring alcoholism and drug abuse under control.

124 Cong. Rec. 30323, 24 (Sept. 20, 1978)[25]

II. TUBERCULOSIS IS A HANDICAP WITHIN THE MEANING OF SECTION 504

Amici refer the Court to the facts about tuberculosis set forth in the briefs of the APHA and the AMA. These facts are sufficient to determine that tuberculosis constitutes a handicap under Section 504. Once a person is diagnosed as having

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[25]. This is strikingly similar to the reaction of the public health community to the June 20, 1986 pronouncement by DOJ that persons with AIDS are not covered by Section 504. "Application of Section 504 of the Rehabilitation Act to persons with AIDS, AIDS-Related Complex, or Infection with the AIDS Virus."

tuberculosis, the person by definition has a "physiological disorder or condition" affecting (in pulmonary cases) the "respiratory" system. 45 CFR §84.3(j)(2)(i). Hence, such a person has a physical impairment within the definition of "handicap." 45 CFR §84.3(j). In most cases the person will manifest symptoms such as fatigue, weight loss, and coughing, and, before treatment, will be contagious. All or any of these symptoms will substantially limit major life activities as defined within the first prong of the regulations. 45 CFR §84.3(j)(2)(ii).

A person who has been successfully treated has a history of an impairment that substantially limits major life activities and is therefore a handicapped person within

the second prong of the statutory definition. 45 CFR §84.3(j)(2)(iii).

If, as in this case, the recipient acts on the belief that the respondent is contagious, then the respondent "has a physical impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation." 45 C.F.R. 84.3(j)(2)(IV)(A). Finally, if the person does not actually have tuberculosis but the recipient bases an adverse action on the belief that the person has contagious tuberculosis, then the person "has none of the impairments defined in paragraphs (j)(2)(i) but is treated by a recipient as having such an impairment." 45 CFR 84.3(j)(2)(IV)(2).

It would be ironic indeed if a recipient's adverse action against a peron with a physical impairment that did not substantially limit major life activities were allowed to escape Section 504 scrutiny. As this Court stated in Southeastern Community College, 442 U.S, at 405-6 n. 6, "A person who has a record of, or is regarded as having, an impairment may at present have no actual incapacity at all. Such a person would be exactly the kind of individual who can be otherwise qualified to participate in covered programs."

Hence, if a recipient takes an adverse action based on tuberculosis, including its effects, then the recipient has taken an action based on handicap within the meaning of Section 504. Whether that action constitutes illegal discrimination

prohibited by the statute can only be established after an individual factual determination of whether the person is "otherwise qualified" to participate in the recipient's program.

III. PERSONS WITH TUBERCULOSIS ARE NOT PER SE EXCLUDED FROM BEING QUALIFIED TO TEACH ELEMENTARY SCHOOL. RATHER, AN INDIVIDUAL FACTUAL DETERMINATION IS REQUIRED

A. The Facts About Tuberculosis Do Not Justify A Blanket Exclusion

As set forth in the amicus brief submitted by the AMA and the APHA, there is no factual basis for a blanket rule excluding all persons with tuberculosis from any employment opportunity, including elementary school teaching. A rule which foreclosed employment opportunities to the thousands of successfully treated tuberculosis patients is precisely the type

of result which Congress sought to avoid in enacting Section 504.

As recognized by this Court in Consolidated Rail Corporation, Congress' explicit purpose was to enhance the employment opportunities of handicapped citizens. Past histories of handicapping conditions and unfounded fears associated with handicaps cannot serve to preclude participation by otherwise qualified handicapped persons in employment. A person trained as a teacher who contracts tuberculosis and is successfully treated or can be accommodated cannot be forever foreclosed from teaching without wholly undermining Congress' intent in passing Section 504. Congress could have addressed safety concerns through the use of generalizations about, for example,

communicable diseases. Instead, Congress and the regulatory agencies adopted a factual, case by case analysis through the requirement that individuals with disabilities be "qualified" for the program in question.

B. Decisions Regarding Handicapped Persons Based on Fear of Contagion Must Be Analyzed In the Same Manner As Other Safety Related Decisions

Section 504 provides a framework for considering safety concerns which has been easily applied by courts presented with such cases. Allegations of safety risks posed by contagion can be analyzed in a similar manner.

The Equal Employment Opportunity Commission, the agency given lead authority for employment discrimination under Section 504, has promulgated regulations which

provide that: "Qualified handicapped person means ... with respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question without endangering the health and safety of the individual or others." 29 C.F.R. §1619. (emphasis added) These regulations are consistent with those governing the other federal agencies, including the Department of Education.

Concerns about health and safety may be as baseless as other stereotypes about disabled people. The function of Section 504 is to separate myth from realty. The mere assertion of health or safety risks, even if based on medical opinion, does not end the inquiry. Virtually every Section

504 employment case involves disputed medical evidence.[26]

> The court's task is to see that the appropriate legal standard for making a factual determination is followed by the [recipient] . . . . Clearly, deference to a [recipient's] fact finding is inappropriate where the agency is a defendant in a discrimination suit. The [recipient] is required to come forward in district court with sufficient evidence to rebut plaintiff's prima facie case."

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[26]. Often "medical" evidence is offered on issues which are not within the expertise of doctors, such as wehther a disabled applicant is qualified to perform job functions. Medical evidence may be no more predictive of job performance than other "scientific" job entry tests. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

Medical opinion may represent a philosophical bias. As stated in Grube v. Bethlehem Area School District, 530 F. Supp. 418, 423 (E.D. Pa. 1982), "It was apparent to the court that the school system['s] [doctor] [was] making a philosophical and not a medical judgment."

New York Association of Retarded Citizens v. Carey, 612 F.2d 644 (2d Cir. 1979). Where safety risks are proven in fact,[27] and cannot be eliminated through reasonable accomodation,[28] the courts have held that the handicapped applicant or employee is not "otherwise qualified." Southeastern Community College, 442 U.S. 397. However in many cases, alleged safety concerns are innaccurate or based on generalizations

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[27]. The exact formulation of the standard for evaluating risks has been stated in a variety of ways, but all balance the rights of handicapped persons with the legitimate safety concerns of employers. No single formulation for all safety cases is appropriate. Rather, the court must examine the medical facts about the disability as well as the nature of the program, how it is operated, and what accommodations are possible.

[28]. All Section 504 regulations define "qualified" in the employment context to include consideration of reasonable accommodation. See, e.g. 28 C.F.R. §41.32 (Department of Justice).

(Pushkin v. Regents, 658 F.2d 1372 (10th Cir. 1981); not job-related (Bentivegna v. Department of Labor, 604 F.2d 619 (9th Cir. 1982); or can be reasonably accomodated (Strathie v. Dept. of Transportation, 716 F.2d 227 (3rd.Cir. 1983).

C. A Remand Is Necessary To Determine Whether Ms. Arline Was Qualified For a Job Within the School District

Section 504 requires an individual factual inquiry as to whether the particular handicapped individual was qualified for the position in question. The fact that Ms. Arline was at some point contagious does not end the inquiry as to whether she was qualified to continue to teach. The Court of Appeals was correct in remanding the case for further factual findings as to whether she could have been accommodated, rather

than dismissed. A that a simple leave of absence might have been sufficient to assure that she was no longer contagious before returning to work. Or, a transfer to a job teaching older students might have eliminated safety risks (as the public health officer testified, J.A. 15, 16, 19) especially since such a transfer was consistent with school district policy (J.A. 57). If Ms. Arline was denied a leave or a transfer which would have been granted for a non-handicapped related reason, a case of non-discrimination would be established. If the school district feared future relapses, an accommodation of periodic testing may have been sufficient to eliminate the uncertainty. See APHA brief, p. 9.

Ms. Arline has been wholly foreclosed from continuing in her chosen profession See

Respondent's Brief. Such a drastic consequence cannot be justified under Section 504 unless the school district can demonstrate that Ms. Arline posed a safety risk that could not be accommodated. Amici agree with the American Medical Association and the American Public Health Association that the record is insufficient to make such a determination.

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